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Attorney for Petitioner

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

ADRIAN RISKIN,

Petitioner,

vs.

HOLLYWOOD MEDIA DISTRICT PROPERTY
OWNERS ASSOCIATION,

Respondent.

Case No. BS166075

(Dept. 82, Hon. Mary Strobel, presiding)

**PETITIONER'S REPLY IN SUPPORT OF
MOTION FOR ATTORNEY'S FEES**

Date: Tues., July 17, 2018 [RESERVED]

Time: 9:30 a.m.

Dept.: 82

TO THE HONORABLE MARY STROBEL, JUDGE OF THE SUPERIOR COURT:

Petitioner Adrian Riskin hereby submits his Reply in Response to Respondent's Opposition to Petitioner's Motion for Attorney's Fees.

1. Introduction.

Respondent erroneously posits that Mr. Riskin had limited success in this litigation and that he did not seek the release of the records the Court ordered disclosed. Respondent also attempts to downplay the relevance of these records. It further implies, incorrectly, that, after it notified Mr. Riskin it was withholding responsive records as exempt, Mr. Riskin had an obligation to convince Respondent to release the purportedly exempt records before filing suit. Respondent goes on to personally attack Mr. Riskin for the First Amendment protected rhetorical speech he employs on his website, but which Respondent dislikes. For these reasons, Respondent claims the Court should deny Petitioner prevailing party status and reject his fee application. None of Respondent's arguments have merit.

1 **2. Petitioner is the Prevailing Party.**

2 Respondent argues throughout his opposition that Petitioner is not the prevailing party. To
3 recap, Petitioner requested certain emails to and from the Respondent's executive director, Lisa
4 Schechter, over a six month period, from early-September 2015 to mid-March 2016. *See* Exhibits A
5 & E to Verified Petition filed November 14, 2016 (Petitioner Riskin's December 8, 2015 and March
6 18, 2016 emails to Media District attorney Jeffrey Briggs).

7 He subsequently petitioned the Court for relief including, "an order declaring that
8 Respondent has violated the CPRA by its refusal to release the public records sought by Petitioner's
9 requests, and by its failure to properly respond to, and assist with, Petitioner's responses." Verified
10 Petition, 9:11-13. The Court, as requested, ordered the Media District to "provide access to, or
11 produce copies of, the following public records previously designated as exempt:

- 12 1) All emails withheld pursuant to the Deliberative Process Privilege;
13 2) All emails withheld pursuant to the Drafts exemption;
14 3) All emails withheld pursuant to the Personnel Privacy exemption, redacted to exclude
15 private personnel health information (2/15/16 email) and volunteer's address (2/29/16
16 email), which is exempt."

17 *See* Judgment filed March 5, 2018.

18 As this lawsuit resulted in an order of disclosure of public records Petitioner is entitled to an
19 award of attorney fees and costs. *Beth v. Garamendi* (1991) 232 Cal.App.3d 896, 901-02.

20 **3. Respondent Produced the Improperly Withheld Records as a Result of This Litigation.**

21 Respondent claims it was unnecessary to litigate the release of the records the Court found
22 improperly withheld. It further claims that Petitioner is not the prevailing party because he did not
23 attempt to convince Respondent, prior to litigation, to release documents it had deemed exempt and
24 refused to produce. Respondent's Opposition to Petitioner's Motion for Award of Attorney Fees
25 ("Opp."), 4:13-20. Respondent, not surprisingly, cites no authority for this position.

26 Respondent complains that "[n]ot a single communication from Petitioner or his counsel prior to
27 commencement of this action questioned any such exemption." Opp., 3:17-19 (emphasis in original).
28 Petitioner and Petitioner's counsel lacked any information about the content of the withheld emails.
How, therefore, could they be expected to question the exemptions prior to litigation?

1 Respondent's position is also an attempt to improperly shift the burden of proof to Petitioner. If
2 the agency objects to disclosure, *the agency carries the burden of proof to show that the requested*
3 *records are exempt from disclosure*. Cal. Gov't Code § 6255. The burden was Respondent's and, as
4 here, when the agency fails to carry that burden, the requested records must be disclosed. *New York*
5 *Times v. Superior Court* (1990) 218 Cal.App.3d 1579, 1586-87 (reversing trial court that failed "to
6 place the burden on the agency to justify withholding the information sought").

7 Respondent also argues that the "Petition did not directly result in the production of exempt
8 records." Opp., 5:20-24. This is factually incorrect. The Petition led directly to the production of the
9 purportedly exempt records. This Court, at a hearing on January 30, 2017, ordered Respondent to
10 "provide access to, or produce copies of, the following public records previously designated as
11 exempt: 1) All emails withheld pursuant to the Deliberative Process Privilege; 2) ... the Drafts
12 exemption; 3) ... the Personnel Privacy exemption, redacted to exclude private personnel health
13 information (2/15/16 email) and volunteer's address (2/29/16 email), which is exempt." See 1/30/18
14 Minute Order. Less than two weeks later, on February 12, 2018, Mr. Briggs, attorney for
15 Respondent, emailed Petitioner's counsel the records which the Court had ordered disclosed.
16 Declaration of Colleen Flynn, Para. 2, filed with Petitioner's Notice of Motion and Motion for
17 Award of Attorney's Fees ("Fee Motion").

18 While Respondent now claims it "clearly would have provided all but the privileged records
19 either as a means of avoiding litigation altogether or so as to avoid the time and expense on that
20 issue in court," Opp., 4:8-10, this is the first time Respondent has so informed Petitioner.
21 Respondent cites to nothing in the record to show it was willing to abandon its claimed exemptions
22 prior to litigation and it cannot, as it never offered to do so. However, it should have abandoned
23 those claims at the outset as the released documents show the exemptions were not well taken.

24 Furthermore, the cases Respondent cites are inapposite as they address lawsuits where fees
25 were denied because records were not produced as a direct result of the litigation. *Rogers v. Superior*
26 *Court* (1993) 19 Cal.App.4th 469 (agency was in the process of producing the records when petition
27 was filed); *Motorola Communication & Electronics, Inc. v. Dep't of General Services* (1997) 55
28 Cal.App.4th 1340, 1344 ("final production was not prompted by the litigation but rather the delay in

1 production until after issuance of the alternative writ was due to uncertainty over the scope of the
2 request and administrative difficulties”). *Belth v. Garamendi* (1991) 232 Cal.App.3d 896, 900-01,
3 however, confirms that awarding attorney fees and costs is mandatory where petitioner has prevailed
4 in the litigation. *Id.* at 901. The case then summarizes the ways one could be the prevailing party,
5 explaining it is not limited to obtaining a favorable final judgment (as Petitioner obtained here).
6 Attorney fees are also available through the catalyst theory and obtaining the requested documents is
7 not required to be entitled to fees. *Id.* at 901-02.

8 Respondent also argues Petitioner is not the prevailing party because he did not obtain all he
9 requested. The law, however, is clear that a petitioner is entitled to a fee award even “where
10 disclosure is ordered for fewer than all of the documents sought.” *Los Angeles Times v. Alameda*
11 *Corridor Transp. Auth.* (2001) 88 Cal.App.4th 1381, 1391.

12 **4. Petitioner Sought the Withheld Records.**

13 Respondent argues incorrectly that “[o]nly in the final phase of the trial did Petitioner
14 challenge Respondent’s claimed exemptions.” Opp., 3:24-25.

15 The Court has already rejected this argument. “Petitioner’s opening brief focused on the
16 reasonableness of Respondent’s search, and not the exemptions. However, Petitioner did request *in*
17 *camera* review (OB 11). Petitioner also expressly stated that ‘Respondent has not established any of
18 its claimed exemptions.’ (Ibid.) At the hearing on November 28, 2017, Petitioner’s counsel stated
19 clearly that ‘petitioner challenges all of the claimed exemptions.’ (Suppl. Reply Exh. A.)” 1/30/18
20 Minute Order, 27 fn. 2. The Petition, furthermore, specifically asked for “an order declaring that
21 Respondent has violated the CPRA by its refusal to release the public records sought by Petitioner’s
22 requests.” Verified Petition, 9:11-13.

23 **5. Public Interest in Records Ordered Released.**

24 Respondent attempts to minimize Petitioner’s success and the significance of the records the
25 Court ordered released stating, “the only records Petitioner obtained in the final result of his action
26 were a handful of draft agendas.” Opp., 4:13-15.

27 Respondent correctly cites *Los Angeles Times v. Alameda Corridor Trasp. Auth.* (2001) 88
28 Cal.App.4th 1381, 1391-92 for the proposition that “circumstances could arise under which a

1 plaintiff obtains documents, as a result of a lawsuit, that are so minimal or insignificant as to justify a
2 finding that the plaintiff did not prevail.” There are no such circumstances here.

3 Release of the emails and attached documents which the Court ordered disclosed was very
4 much in the public interest. Petitioner published the records to his website, michaelkohlhaas.org, and
5 wrote several articles about their significance.¹² Although some of the Respondent’s emails had a
6 gossipy, unprofessional tone, they nevertheless brought to light the workings of the BID, including a
7 potential Brown Act violation.³ The records included draft meeting agendas, information regarding a
8 violent incident (a bite by an individual claiming to be HIV positive and the LAPD’s response),
9 committee vacancies, additional staff, meeting dates and locations, bylaws, website, a presentation
10 regarding a project just north of the BID’s boundary, etc.⁴

11 **6. Petitioner’s Speech Regarding CPRA Requests is Protected by the First Amendment.**

12 Through his CPRA requests, Petitioner has acquired an in-depth understanding of the BIDs
13 in Los Angeles. On February 4, 2018, he was quoted in the *Los Angeles Times* regarding the Venice
14 BID. “The furor over the newly formed [Venice] BID is unusual, said Adrian Riskin, a blogger who
15 has written critically about business improvement districts in Los Angeles.... Some business
16 improvement districts have been accused in court of violating the rights of homeless people or street
17 vendors, but ‘most of them fly under the radar,’ Riskin said.”⁵

18 ¹ “An Unforced Error By Self-Proclaimed Hollywood SuperLawyer Jeffrey Charles Briggs Provides
19 Unique Insight Into the Thoroughly Cynical, Thoroughly Bogus Nature of BID’s Use of the Deliberate
20 Process Exemption to the California Public Records Act – They Even Used it in Once Case to Cover Up a
21 Blatant Brown Act Violation,” available at <http://michaelkohlhaas.org/wp/2018/02/08/an-unforced-error-by-self-proclaimed-hollywood-superlawyer-jeffrey-charles-briggs-provides-unique-insight-into-the-thoroughly-cynical-thoroughly-bogus-nature-of-bids-use-of-the-deliberative-process/> [as of June 20, 2018]

22 ² “More Hollywood Media District CPRA Exemption Claims Exposed by Court Order as Unmitigated
23 Mendacity...” available at <http://michaelkohlhaas.org/wp/2018/02/17/more-hollywood-media-district-cpra-exemption-claims-exposed-by-court-order-as-unmitigated-mendacity-e-g-laurie-goldmans-city-hall-gossip-mongering-chittery-chat-to-fellow-board-members-ferr/> [as of June 20, 2018]

24 ³ *Id.*

25 ⁴ *Id.*

26 ⁵ “ For Venice property owners, the bills have arrived – but promised services have not” *Los Angeles*
27 *Times*, February 4, 2018, available at <http://www.latimes.com/local/lanow/la-me-ln-venice-business-district-20180204-story.html> [as of June 20, 2018] (Petitioner’s quote hyperlinks to articles regarding the homeless
28 and stress vendor litigation against BIDs)

1 Respondent's contention that Petitioner's intent is harassment is without merit. Petitioner
2 utilizes the CPRA to monitor the workings of the BIDs. He often publishes the records he obtains
3 and writes articles about them. He is highly critical of the BIDs, their employees, and their counsel
4 in part for the manner in which they often fail to comply with the spirit and the law of the CPRA.

5 On his website, Petitioner advocates for a mechanism to mediate CRPA disputes that does
6 not require the expense of litigation, linking to Sunshine Laws in other cities that have such
7 mechanisms.⁶ This underscores that Petitioner's interest in the CPRA is to obtain, analyze and
8 publish public records.

9 Respondent objects to Petitioner's use of rhetorical speech, colorful language, often mocking
10 and sarcastic, to make what might otherwise sound dry much more interesting. The First
11 Amendment long-recognizes that "[s]trong and effective extemporaneous rhetoric cannot be nicely
12 channeled in purely dulcet phrases. An advocate must be free to stimulate his audience with
13 spontaneous and emotional appeals for unity and action in a common cause. . . . To rule otherwise
14 would ignore the profound national commitment that debate on public issues should be uninhibited,
15 robust, and wide open." *NAACP v. Claiborne Hardware* (1982) 458 U.S. 886, 928 (citation
16 omitted)(internal quotation marks omitted).

17 In this litigation, Petitioner was initially motivated by uncovering revolving-door violations
18 by Executive Director Lisa Schechter. However, as the articles he wrote about the court-ordered
19 released documents show, he was interested in all documents that reflect the workings and alleged
20 wrongdoings of Respondent. Not only do the records illuminate the workings of the BID, they also
21 show how Respondent was misusing the law in this case, improperly claiming these public records
22 were exempt pursuant to the deliberate process and drafts exemptions.

23 **7. Hours Spent Were Reasonable and Necessary to Prevail.**

24

25 ⁶ "A Recent Contribution by Blair Besten to the Downtown Homelessness Discourse Briefly Reviewed
26 Along With a Less Brief Discussion of Why the Review is So Brief," available at
27 [http://michaelkohlhaas.org/wp/2017/02/13/a-recent-contribution-by-blair-besten-to-the-downtown-](http://michaelkohlhaas.org/wp/2017/02/13/a-recent-contribution-by-blair-besten-to-the-downtown-homelessness-discourse-briefly-reviewed-along-with-a-less-brief-discussion-of-why-the-review-is-so-brief/)
28 [homelessness-discourse-briefly-reviewed-along-with-a-less-brief-discussion-of-why-the-review-is-so-brief/](http://michaelkohlhaas.org/wp/2017/02/13/a-recent-contribution-by-blair-besten-to-the-downtown-homelessness-discourse-briefly-reviewed-along-with-a-less-brief-discussion-of-why-the-review-is-so-brief/)
[as of June 18, 2018]

1 Respondent claims all Petitioner's counsel's work on the case, from the drafting of the petition
2 to the trial setting conference, communications with Mr. Briggs and through the first hearing on the
3 petition should not be compensated at all. Opp., 8:1-3. Respondent cites no authority for this clearly
4 erroneous proposition. It was Respondent's burden to justify the withheld documents. And it did not
5 even attempt to do so until supplemental briefing near the end of the litigation. Therefore, all of the
6 work done on the case, from the drafting of the petition through the instant motion was reasonable
7 and necessary to prevail. Nevertheless, Petitioner has asked for approximately 20% fewer hours than
8 total hours recorded.

9 **8. Petitioner Reduced the Number of Hours Requested.**

10 Although Respondent correctly cites *Bernardi v. County of Monterey* (2008) 167 Cal.App.4th
11 1379 for the proposition that Petitioner's fees need not be commensurate with the degree of success
12 in the litigation he goes on to argue that the Court should do exactly that. Respondent argues, "fees
13 should be apportioned relative to any "success" achieved because he has reduced his fee request..."
14 Opp, 7:10-12. Courts have warned against such a rule. "A rule requiring an award of attorney fees to
15 be commensurate with the degree of success in CPRA litigation could have a similar chilling effect
16 [i]f... the trial court was required to reduce the loadstar amount in strict proportion to the ration of
17 successful to unsuccessful public records requests." *Bernardi*, 167 Cal.App.4th at 1397.

18 Although not required, Petitioner nevertheless apportioned the number of hours sought.
19 Petitioner reduced the amount of time requested by approximately 20% to account for the fact that
20 additional documents were not produced as a result of the second search. Due to the high percentage
21 of non-responsive and duplicate records, as well as the limited number of actually responsive records
22 provided, Mr. Riskin's petition included a request for an additional search. Before the status
23 conference on April 11, 2017, the parties discussed the issues with the initial search and production
24 and Respondent did subsequently perform an additional search for responsive documents (AR 38.)
25 The subsequent search, however, did not result in the disclosure of records which had not already
26 been produced. Therefore, Petitioner deducted time spent on discovery, including written discovery
27 and Ms. Schechter's deposition,⁷ an approximate 20% decrease in time, as that effort went primarily

28 ⁷ Respondent is correct that Petitioner does not seek reimbursement for the cost of the deposition.

1 towards the request for an additional search. This reduction, while not required, underscores the
2 reasonableness of Petitioner's fee motion.

3 **9. The Requested Hourly Rate is Reasonable.**

4 Respondent argues Petitioner's counsel should not be compensated at a rate higher than that
5 of Respondent's counsel at \$350 per hour. Opp., 9:7-9. The only evidence Respondent submits to
6 support this contention is the rate paid to Respondent's counsel to defend this lawsuit. However, the
7 economic model for civil defense work is not the same as for the plaintiffs' bar. Defense counsel,
8 such as Mr. Briggs, have ongoing, regularly paid business from their clients and so can work for
9 discounted rates. *Syers Property III, Inc. v. Rankin* (2014) 226 Cal.App.4th 691, 464 (defense firms
10 typically charge their clients below market rates; when filing a fee motion they can seek hourly rates
11 higher than those they charge their clients who pay hourly). Mr. Briggs "represent[s] or has [has]
12 represented some 14 other Business Improvement Districts." Declaration of Jeffrey C. Briggs, Para.
13 1, submitted concurrently with Opp. As explained in *Trevino v. Gates* (9th Cir. 1996) 99 F.3d 911,
14 925, "private attorneys often charge lower rates to the government because of the counterbalancing
15 benefits such as repeat business, and [w]here the facts show this, the fee charged by a government
16 attorney is simply irrelevant to the establishment of a reasonable hourly rate for a plaintiff's civil
17 rights lawyer" (citing *Brooks v. Georgia State Board of Elections* (11 Cir. 1993) 997 F.2d 857, 869-
18 70). Respondent's only evidence is therefore incompetent for the purpose of determining Petitioner's
19 counsel's rate.

20 Petitioner, on the other hand, has submitted competent evidence in the declarations of counsel
21 and that of fee expert, Carol A. Sobel, to establish the reasonableness of the \$650 an hour rate
22 sought. Ms. Sobel declared that she is familiar with the qualifications, skill, experience and
23 reputation of Petitioner's counsel. Sobel Decl. Para. 9. Ms. Sobel co-counseled with Petitioner's
24 counsel on a recent Public Records Case. *Id.* She further declared that, in her opinion, Petitioner's
25 counsel "is very skilled and experienced in the area of public records litigation, including a
26 significant opinion in the Ninth Circuit in *Hiken v. DOD.*" She concluded that "the rate sought is
27 reasonable." Sobel Decl. Para. 10. Submitted as exhibits to Ms. Sobel's declaration are cases
28

1 substantiating the requested rate. As Ms. Sobel explained, the relative simplicity or complexity of a
2 case is reflected in the efficiency of the hours, not the loadstar rate of the attorney. *Id.* at Para. 16.

3 **10. Number of Hours Submitted is Reasonable.**

4 Respondent argues Petitioner should only be awarded 11% of the hours sought, Opp., 8:8-10,
5 ignoring the reasonable number of hours required to prevail.

6 On November 14, 2016, Petitioner filed his verified petition for writ of mandate. On
7 September 28, 2017, Petitioner filed his opening brief. On October 27, 2017, Respondent filed its
8 opposition brief. On November 13, 2017, Petitioner filed his reply. The petition came on for hearing
9 on November 28, 2017. At the hearing the Court modified its tentative and ordered Respondent to
10 produce a privilege log identifying the responsive records it has withheld and the claimed
11 exemptions for each record. The Court also ordered Respondent to file a supplemental opposition
12 addressing only the claimed exemptions and no other issues. Respondent was also ordered to review
13 all files from the latest search to ensure that all responsive documents have been produced. At the
14 hearing on January 30, 2018, the Court concluded that Respondent had not justified withholding any
15 emails based on the deliberative process or drafts privileges and ordered produced those records,
16 unredacted, except for two emails where an address and health information could be redacted. *See*
17 1/30/18 Minute Order. The hours expended to prevail, minus the 20% deducted, should be
18 compensated. The number of hours sought here are reasonable, well-documented, and were
19 “required to conclude the matter.” *Bernardi v. County of Monterey* (2008) 167 Cal.App.4th 1379,
20 1395.

21 **11. Conclusion.**

22 For the foregoing reasons, this Court should issue an order directing Respondent to reimburse
23 Petitioner for her attorney fees in the amount of \$48,360.

24 DATED: June 20, 2018

25 **COLLEEN FLYNN**
26 Attorney for Petitioner

27 By /s/Colleen Flynn
28 Colleen Flynn

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Proof of Service

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen and not a party to the within action. My business address is 3435 Wilshire Blvd., Suite 2910, Los Angeles, CA 90010.

On June 20, 2018, I served the within document(s) described as:

Petitioner's Reply in Support of Motion for Attorney's Fees

on the interested parties in this action as stated below:

Jeffrey Briggs
Briggs Law
6464 Sunset Blvd., Suite 715
Hollywood, CA 90028

by electronic mail.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 20, 2018, at Los Angeles, California.

Colleen Flynn
(print name)



(Signature)